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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Motion Picture Association of America, Inc. hereby respectfully moves for leave to file as *amicus curiae* in this case the brief appended hereto. The consent of the attorneys for the Petitioner has been obtained. On November 9, 1971, movant wrote to the attorney for the Respondent. Copies of movant's letter and the reply thereto dated November 22, 1971, are appended to this Motion as Appendix A and Appendix B, respectively.

Motion Picture Association of America, Inc. ("MPAA") is a trade association whose membership comprises companies which are among the largest producers and distributors of motion pictures in the United States, to wit:

Allied Artists Pictures Corporation,
Avco Embassy Pictures Corp.,
Columbia Pictures Industries, Inc.,
Metro-Goldwyn-Mayer, Inc.,
Paramount Pictures Corporation,
Twentieth Century-Fox Film Corp.,
United Artists Corporation,
Universal Pictures, a division of Universal City Studios, Inc.,
Warner Bros., Inc.

At the present time there are approximately 14,450 commmercial motion picture theatres in the United States, of which about 3,810 (or 26% of the total) are so-called "drive-ins." A substantial proportion of the films exhibited by these drive-ins are produced and/or distributed by the companies which are members of MPAA. (However, the film involved in this case, "Carmen, Baby," was not produced and is not being distributed by a member of MPAA.)

Although the merits of the specific controversy involving exhibition of "Carmen, Baby" at the Park-Y Drive-In Theatre in Richland, Washington, will be briefed and argued by the parties, the Petition for Writ of Certiorari raises two additional questions of more general significance to the entire motion pictures industry. These are: (1) the constitutional means by and limits under which states may prohibit and punish the "obtrusive" presentation of non-obscene films, and (2) the constitutional permissibility of seizures of motion pictures which are not alleged to be obscene *per se*. Any decision by this Court on these questions will vitally affect the constitutional interests of MPAA's member companies, as well as all other producers, distributors and exhibitors of motion pictures in the United States.

Because MPAA believes that the general issues raised in this case are of vital concern to the entire motion picture industry, including its member companies, it respectfully requests permission to file the within brief *amicus curiae*.

Respectfully submitted,

LOUIS NIZER
Attorney for Motion Picture Association of America, Inc., Amicus Curiae

BARBARA SCOTT
JAMES BOURAS
of Counsel

APPENDIX A

(Letter of November 9, 1971)

MOTION PICTURE ASSOCIATION OF AMERICA, INC.
522 Fifth Avenue
New York, N. Y. 10036

November 9, 1971

AIR MAIL
The Hon. Herbert H. Davis
Prosecuting Attorney for
Benton County
P. O. Box 510
Prosser, Washington 99350

Re: *Rabe* v. *State of Washington*
(United States Supreme Court,
October Term, 1971, No. 71-247)

Dear Mr. Davis:

The Motion Picture Association of America is a trade association representing the major producers and distributors of motion pictures in the United States. Its members are:

Allied Artists Pictures Corp.
Avco Embassy Pictures Corp.
Columbia Pictures Industries, Inc.
Metro-Goldwyn-Mayer, Inc.
Paramount Pictures Corp.
Twentieth Century-Fox Film Corp.
United Artists Corp.
Universal Pictures, a division of Universal City Studios, Inc.
Warner Bros., Inc.

Because of the interest of the Association's members in the constitutional questions raised in *Rabe* v. *State of*

Appendix A

Washington, we would very much like to file a brief *amicus curiae* in support of the petitioner, William Rabe, in the action now pending in the Supreme Court (October Term, 1971, No. 71-247).

May we have your consent on behalf of the State of Washington to the filing by the Motion Picture Association of a brief *amicus curiae* in this case?

Thank you in advance for your consideration.

Very truly yours,

JAMES BOURAS

APPENDIX B

(Letter of November 22, 1971)

OFFICE OF THE
PROSECUTING ATTORNEY OF BENTON COUNTY
1112 Meade Ave., Prosser, Washington 99350

November 22, 1971

Reply to:
Curtis Ludwig
P. O. Box 6880
Kennewick, WA 99336

Mr. James Bouras
Motion Picture Association of America
522 Fifth Avenue
New York, New York 10036

Re: *Rabe* vs. *Washington*

Dear Mr. Bouras:

Your request for our consent to file an amicus curiae brief is one of several we have received.

Because of the other requests and our belief that the questions of law are being adequately presented by petitioner's counsel, we are unwilling to consent to any amicus curiae briefs.

Very truly yours,

HERBERT H. DAVIS
Prosecuting Attorney
Curtis Ludwig
CURTIS LUDWIG, Deputy
Prosecuting Attorney
Benton County, Washington

CL:ml

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE*

Interest of the *Amicus*

The interest of the *Amicus* is set forth in the Motion for Leave to file this brief, *supra.*

ARGUMENT

I.

An "obtrusive" presentation of a non-obscene motion picture may not constitutionally be punished as a crime in the absence of a statute making such presentation a crime and defining the elements thereof with particularity.

This Court has long held that the Constitution requires that "Every man should be able to know with certainty when he is committing a crime." *United States* v. *Reese et al.*, 92 U.S. 214, 220 (1875).

Yet Petitioner in this case was convicted of a crime which was nonexistent under the laws of the State of Washington at the time of his arrest—"obtrusive" exhibition[1] of a non-obscene motion picture which the justices of the Supreme Court of Washington found "*personally* distasteful, offensive and devoid of social, philosophical or artistic merit." *State* v. *Rabe*, 79 Wash.2d 254, 484 P.2d 917, 921 (1971) (emphasis added).[2]

In effect, what the Supreme Court of Washington has done in this case is engraft onto the State's general obscenity law a new, common law crime[3] whose scope is unde-

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[1] The majority opinion in the Supreme Court of Washington seems to imply that a mere *potential* for "an assault upon individual privacy" is sufficient to permit punishment, even in the absence of complaints. However, as Associate Justice Finley indicates in his concurring opinion (484 P.2d at 928), "the facts of the instant case do not, in my opinion, support the finding of an assault upon individual privacy. . . ." Cf. *Cohen* v. *California*, 403 U.S. 15, 21 (1971): ". . . the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense." Also, some weight should be ascribed in cases of this type to whether or not unwilling persons can avoid anything more than momentary exposure to the material "simply by averting their eyes." *Ibid.*

[2] The majority held that the motion picture involved "probably would pass the definitional obscenity test" (484 P.2d at 922).

[3] This was done despite the canon that "This is a penal statute, and must be construed strictly. . . ." *United States* v. *Reese et al.*, 92 U.S. 214, 219 (1875).

Moreover, the Supreme Court of Washington's expansive construction of the State's general obscenity law is somewhat ironic in view of its observation (484 P.2d at 925) that the conviction could not be supported on the basis of exposure of children because the law did not at the time reflect a specific concern for children. It is difficult to see how it can be said that the same law impliedly reflects a specific concern for "obtrusive" presentations. Washington has

(Footnote continued on following page)

fined and about whose application in future cases drive-in theatre owners and operators in the State of Washington must guess at the risk of both a fine and a jail sentence.[4] If Petitioner's conviction is affirmed by this Court, the *in terrorem* effect of the Washington decision will spread across the nation.

To be sure, this Court has indicated that, in the case of certain material which approaches but does not meet the constitutional test of obscenity *per se*, states might legitimately concern themselves with "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Redrup* v. *New York*, 386 U.S. 767, 769 (1967) (per curiam). But it has never held that states may proceed in such cases in the absence of legislative action confined to material with, and means by, which states may constitutionally deal in this context.

Indeed, it is our belief that, if states may constitutionally proceed in so-called "public display" cases, they may do so only under specific statutes narrowly and precisely drawn to deal with the "evil" sought to be proscribed. Moreover, such statutes must keep in mind that "we are often 'captives' outside the sanctuary of the home," *Rowan* v. *Post Office Dept.*, 397 U.S. 728, 738 (1970), that different constitutional considerations apply when such proceedings affect the public at large rather than a single unwilling individual, *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 420 (1971), and that in the

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since enacted a comprehensive legislative scheme for the protection of minors. R.C.W., Sections 9.68.050-120 (1971 Pocket Part).

In addition, the somewhat analogous crime of "indecent exposure" is at least defined by the State of Washington as a specific crime, although perhaps not with the requisite clarity. R.C.W., Sections 9.79.080, 9.79.120 (1961).

[4] R.C.W., Section 9.68.010 (1971 Pocket Part) defines obscenity as a "gross misdemeanor." R.C.W., Section 9.92.020 (1961) makes a gross misdemeanor punishable by up to a year in jail or a $1,000 fine, or both.

public context there must be "a showing that substantial privacy interests are being invaded in an essentially intolerable manner," *Cohen* v. *California*, 403 U.S. 15, 21 (1971). Furthermore, in the "public display" situation, statutes "obviously cannot leave the determination of what is offensive to the sole discretion of each person who may be confronted with such a display" since it "simultaneously reaches both consenting and unconsenting receipients." *The Report of the Commission on Obscenity and Pornography* 324, 365 (1970) (Legal Panel Report).[5]

The constitutional vices inherent in any approach other than that described in the preceding paragraph are amply demonstrated by the instant case.

First, "the State [of Washington] has punished [Petitioner] for conduct that was not criminal at the time [he] committed it, and hence has violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits. . . . There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narraw and precise statutory language." *Bouie* v. *City of Columbia*, 378 U.S. 347, 350, 352 (1964).[6]

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[5] In what might loosely be termed a "private display" situation—*i.e.*, where governmental action affects only communication to a single unwilling individual—different constitutional considerations apply when the disseminator's function is ministerial only. *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970). Even in this situation, however, the constitutional requirement of "fair warning" comes into play where an enactment calls for the disseminator to make judgments at his peril. *Pent-R-Books, Inc.* v. *United States Postal Service*, 328 F.Supp. 297 (E.D.N.Y. 1971).

[6] On a factual basis, this Court's decision in *Ginsburg* v. *United States*, 383 U.S. 463 (1966), does not support the Supreme Court of Washington's "contextual" construction of its State obscenity law. *Ginsburg* held merely that, in close cases, evidence of "pandering" is relevant in determining whether claimed "redeeming social value"

Both at the time of Petitioner's arrest and at the present time, Washington's general obscenity law, on its face, dealt only with material which was obscene *per se*.[7] Like the statute involved in *Cohen* v. *California, supra* at 19, the Washington law did not contain "any language . . . that would have put [Petitioner] on notice that certain kinds of otherwise permissible speech . . . would nevertheless . . . not be tolerated in certain places."

Second, the opinion of the Supreme Court of Washington contains a complete "lack of guidance to those who seek to adjust their conduct" to conform thereto. *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 689 (1968). Indeed, the opinion is so vague and imprecise "that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926). In the complete absence of "a sufficiently ascertainable standard of guilt," *Herndon* v. *Lowry*, 301 U.S. 242, 261 (1937), the decision and opinion are more than likely to induce the amount of self-censorship which this Court condemned in *Smith* v. *California*, 361 U.S. 147 (1959).

Third, the opinion provides no guidance to the police and prosecutors who must decide what, if any, prosecutions are to be commenced on the ground of "obtrusive"

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is feigned or real, even though the materials "cannot themselves be judged obscene in the abstract." *Id.* at 470, 474. In effect, the "pandering" found in *Ginzburg* impaired defendant's credibility in claiming "redeeming social value." *Ginsburg* involved an affirmative course of conduct on the part of defendant to deliberately "force public confrontration with the potentially offensive aspects of the work. . . ." *Id.* at 470. None of this is present in the instant case. Cf. *People* v. *Noroff*, 63 Cal.Rptr. 575, 433 P.2d 479, 480 (Sup.Ct. 1967), cert. denied, 390 U.S. 1012 (1968), refusing to admit evidence of "pandering" in an obscenity case on the ground, among another, that "the State Legislature has created no such crime."

[7] R.C.W., Section 9.68.010 (1961, 1971 Pocket Part).

presentation of non-obscene motion pictures. *Interstate Circuit* v. *Dallas, supra* at 689-690. In the absence of any guidelines, decisions to prosecute will be based, of necessity, on "personal predilections." *Cohen* v. *California, supra* at 21.

Fourth, other than their own "personal predilections," it is difficult to see what standards can be employed by judges and juries in the State of Washington in future cases of this type, or what standards can be employed by the justices of the Supreme Court of Washington in reviewing such cases. Indeed, in affirming Petitioner's conviction, the Supreme Court of Washington said only that it found the film "*personally* distasteful, offensive . . ." *State* v. *Rabe, supra,* 484 P.2d at 921 (emphasis added). The opportunity for effective judicial review is therefore completely foreclosed. *Interstate Circuit* v. *Dallas, supra* at 690.

As noted in the Motion for Leave to file this brief, *supra,* there are at the present time approximately 14,450 commercial motion picture theatres in the United States, of which about 3,810 (or 26% of the total) are drive-ins. This Court's decision in the instant case therefore will have a profound impact on the future course of motion picture production, distribution and exhibition in the United States. Indeed, the "chilling effect" inherent in any approach other than that which we have described above (see text, pages 3-4, *supra*) is demonstrated not only by the instant case, but also by some of the approaches considered by other courts in other cases involving allegedly "obtrusive" presentations. These cases are outlined and discussed in the numbered paragraphs below.

1. *Injunction Cases.* The instant case is the only one in which a criminal penalty has been imposed absent specific statutory authorization therefor, but there are two cases in which injunctions have issued absent specific authorization. *Bloss* v. *Paris Township,* 380 Mich. 466,

157 N.W.2d 260 (1968); *Cactus Corporation* v. *State ex rel. Murphy*, 14 Ariz.App. 38, 480 P.2d 375 (1971).[8]

Bloss involved denial of license renewal and the issuance of an injunction prohibiting operation of plaintiff's drive-in theatre in any manner. This approach is clearly invalid on the ground, among others, that it prevents all future exhibitions of motion pictures of any kind. *Near* v. *Minnesota*, 283 U.S. 697 (1931); *Organization for a Better Austin* v. *Keefe*, *supra* at 418-419.[9]

Cactus involved issuance of an injunction against exhibition of a specific motion picture "or any other motion picture film of the same character." This approach is clearly invalid on the ground, among others, that the vagueness of the injunction imposes an impossible burden on those who must conform their conduct therewith upon penalty of contempt. *Rowan* v. *Post Office Dept.*, *supra* at 735, 737; *New Riviera Arts Theatre* v. *State*, 412 S.W.2d 890 (Tenn.Sup.Ct. 1967); *Robert Arthur Management*

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[8] Issuance of the injunction in each case was predicated on a finding that the "obtrusive" manner of presentation constituted a "public nuisance." Cf. *Grove Press, Inc.* v. *City of Philadelphia*, 418 F.2d 82, 88 (3d Cir. 1969): "The common law of public nuisance may be a perfectly valid method by which to implement a state's police power in certain defined circumstances where, for example, it is used to restrain that which is prohibited by other constitutionally appropriate standards. It may not be used, however, both to define the standards of protected speech and to serve as the vehicle for its restraint."

[9] By the same token, license revocation is a constitutionally impermissible sanction in the First Amendment area. See, *e.g.*, *Van Curler Broadcasting Corp.* v. *Musto, et al.* (U.S.D.C., D.N.J., Civil Action No. 431-68) (opinion of Augelli, J., dated June 4, 1968) (not officially reported): "The ordinance, as presently written, permits revocation of an annual license to operate a theatre, for the showing of a single film found by the Board to be 'lewd, obscene or indecent.' The revocation is final, and such step is taken without regard to a licensee's right to exhibit, during the remaining life of the license, motion pictures that are not obscene." See also: *Oregon Bookmark Corporation* v. *Schrunk*, 321 F.Supp. 639, 642 (D.Ore. 1970).

Corp. v. *State*, 414 S.W.2d 638 (Tenn.Sup.Ct. 1967), rev'd on other grounds, 389 U.S. 578 (1968) (per curiam).[10]

2. *"Fence" Legislation.* Two cases involved ordinances compelling construction of fences to concel images on drive-in screens from persons outside the theatre. In our opinion, such legislation raises grave constitutional problems.

In *Olympic Drive-In Theatre, Inc.* v. *City of Pagedale*, 441 S.W.2d 5 (Mo.Sup.Ct. 1969), one such ordinance was held invalid on the ground, among others, of what in effect amounted to overbreadth—namely, "it requires the drive-in theatre operator to locate his screen or erect fences so that the movies cannot be seen from the streets or highways *no matter what kind of picture is being shown.*" *Id.* at 10 (emphasis added).[11]

In *Cinecom Theatres Midwest States, Inc.* v. *The City of Fort Wayne, et al.*,[12] both a temporary restraining order and a preliminary injunction were issued against enforcement of a similar ordinance.

3. *Enactments Dealing Specifically With "Obtrusive" Presentations.* Two cases, *State* v. *Furio*, 267 N.C. 353,

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[10] Cf. *Close* v. *Lederle*, 424 F.2d 988 (1st Cir. 1970), cert. denied, 400 U.S. 903 (1970), involving a mere order to desist with no penalty involved. Also involved in the *Close* case, *sub silentio*, were such issues as an employer-employee relationship, the propriety of issuing a mandatory injunction, etc.

[11] The decision also found void for vagueness another ordinance permitting license revocation. See footnote 9, *supra*.

[12] State of Indiana, County of Allen, Allen Superior Court No. 3, Cause No. 16620 (not officially reported). The temporary restraining order was entered on August 14, 1970, by Judge Robert L. Thompson, Jr., and the preliminary injunction was entered on September 8, 1970, by Judge David B. Keller. We have no information on further proceedings, if any, in this case.

148 S.E.2d 275 (1966),[13] and *State of Nebraska* v. *Blank*,[14] involved ordinances specifically prohibiting "obtrusive" presentations of motion pictures, both of which were found void for vagueness.

Chemline, Inc. v. *City of Grand Prairie*, 364 F.2d 721 (5th Cir. 1966), upheld in principal the validity of a similar ordinance but did not consider the question of vagueness.[15]

People v. *Lou Bern Broadway, Inc.* (Criminal Court, County of New York, November 9, 1971)[16] upheld the con-

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[13] The ordinance involved read as follows: "It shall be unlawful for any person, firm or corporation to construct or maintain along any street or highway, in such a manner as to be visible to the general public using such street or highway, any sign, billboard, motion picture screen or other structure upon which is printed, painted, projected or displayed any nude, or semi-nude pictures or any pictures or words which are vulgar, indecent or offensive to the public morals."

[14] Municipal Court of the City of Omaha, Douglas County, Nebraska, Docket No. C7 (not officially reported). The ordinance involved read as follows: "It shall be unlawful for any owner or operator of an outdoor theater to show or cause to be shown a motion picture depicting any person, whether nude or clad, in an act of sexual intercourse or unnatural copulation where the viewing portion of the screen of such theater is situated within the view of any residence or public street or highway where children under eighteen (18) have an understanding view of the picture." On February 2, 1971, Judge D.B. Anderson granted defendant's motion to dismiss on the ground, among others, that the ordinance was void for vagueness.

[15] In relevant part, the ordinance involved prohibited the exhibition of "any motion picture . . . which is visible from any public street or highway in which the bare buttocks or the bare female breasts of the human body are shown or in which striptease, burlesque or nudist-type scenes constitute the main or primary material of the movie. . . ."

[16] Not yet officially reported. The opinion is reprinted in *New York Law Journal*, November 10, 1971, page 17, column 8; page 18, columns 1-3.

stitutionality of New York State's recently enacted "public display" legislation.[17]

See also: *Vista Theatre Corporation* v. *City of Fort Worth,* 322 F.Supp. 1147 (N.D.Tex. 1971).[18]

Again, we recognize that this Court, other courts and various legislative bodies have manifested a concern about preventing the exposure of certain kinds of non-obscene material to unwilling persons. However, we believe that, if there is to be "an adjustment between the rights of the disseminator and the nonconsenting viewer," *State* v. *Rabe, supra,* 484 P.2d at 924, it must be consistent with the First Amendment. Certainly, both the approach and opinion of the Supreme Court of Washington fall far short of recognizing, let alone protecting, First Amendment rights.

In short, it is our position that states may proceed in cases such as this only under specific statutes narrowly and precisely drawn to deal with the "evil" sought to, and which may constitutionally, be proscribed.[19] Accordingly, since the State of Washington "has not as yet provided by 'appropriate legislation' for the punishment of the offence charged," *United States* v. *Reese et al., supra* at 221, Petitioner's conviction must be reversed.

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[17] New York Penal Law, Sections 245.10-11 (effective September 1, 1971).

[18] This case involved, but did not pass on the constitutionality of, an ordinance which read as follows: "It shall be unlawful for the owner, manager, operator, assistant manager, assistant operator, ticket seller, ticket taker, usher and/or any other person connected with or employed by any motion picture theater or drive-in motion picture theater in the City of Fort Worth or to aid or assist in such showing or exhibition of any motion picture, film, slide or other exhibit which is visible from any public street or highway in which the public area, bare buttocks or bare female breasts of the human body are shown."

[19] In the text of this brief we have addressed ourselves only to the issue of "public display." See footnote 5, *supra.*

II.

Seizure of a motion picture which is not alleged be obscene *per se* is constitutionally impermissible.

Petitioner has argued that seizure of a motion picture constitutionally impermissible unless there has been a or "adversary hearing."

We agree that this should be the constitutional requirent when a motion picture is alleged to be obscene *per se*. wever, we believe the First Amendment compels a more ngent constitutional requirement when a motion picture ot alleged to be obscene *per se*:[20] absent extraordinary cumstances,[21] *any* seizure is constitutionally impermisle in such a case.

As this Court recognized in *Speiser* v. *Randall*, 357 S. 513, 520, 525 (1958), "When we deal with the complex strands in the web of freedom which make up free ech, the operation and effect of the method by which ech is sought to be restrained must be subjected to se analysis and critical judgment in the light of the rticular circumstances to which it is applied. . . . The aration of legitimate from illegitimate speech calls for sensitive tools. . . ."

Seizure is hardly a "sensitive tool" when a motion ture is not alleged to be obscene *per se*. It's more like lunderbuss.

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[20] This would include cases involving alleged unlawful exhibition ninors, alleged "obtrusive" presentation, and/or alleged "pander-" See *Redrup* v. *New York*, 386 U.S. 767, 769 (1967) (per iam).

We recognize, of course, that states may seek to evade the con-utional requirement we are suggesting by making specious allega-s of obscenity *per se* as well. However, the availability of alter-ives (see text, *infra*) may reduce any incentive to so allege.

[21] We do not consider here what might constitute such "extraor-ary circumstances."

It has been recognized that a single print of a motion picture may reach many thousands of viewers,[22] and that seizure thereof has the same suppressive effect as the seizure of "massive" quantities of books. See, *e.g.*, *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410, 412 (2d Cir. 1969), cert. denied, 397 U.S. 920 (1970); *Astro Cinema Corp. Inc.* v. *Mackell*, 422 F.2d 293, 295-296 (2d Cir. 1970); *United States* v. *Thevis*, 328 F.Supp. 135, 136 (E.D.La. 1971).

In a case where a motion picture is not alleged to be obscene *per se*, seizure is "not reasonably restricted to the evil with which it is said to deal." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957). Instead, even though the complaint is directed only to a specific use of the motion picture, seizure prevents *all* uses of that motion picture, even those which the state would concede to be valid.

In *Ginzburg* v. *United States*, 383 U.S. 463, 475 (1966), this Court was careful to note that its decision "does not necessarily suppress the materials in question, nor chill their proper distribution for a proper use." See also: *Memoirs* v. *Massachusetts*, 383 U.S. 413, 420-421 (1966). In the instant case, by contrast, seizure and detention of "Carmen, Baby" made impossible even what the Supreme Court of Washington would concede to be a "proper" exhibition—*e.g.*, to an audience of adults in an enclosed, "four wall" theatre.[23]

We recognize that, in a case such as this, the state may have a legitimate interest in securing *temporary* use of a print for the preparation and in the presentation of its

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[22] Both in the theatre at which it is currently being exhibited and in theatres at which it is subsequently exhibited. In addition, it should be recognized that prints of a motion picture are quite expensive and are available in limited supply.

[23] We recognize that the initial allegation was one of obscenity *per se*. But see footnote 20, *supra*.

case.[24]. But seizure, which suppresses exhibition of a print through termination of the trial stage and possibly through the appellate stage, is not a constitutionally permissible means by which the state can secure such temporary use. Like the typically "overbroad" statute, seizure in such a case sweeps within its ambit constitutionally protected as well as unprotected uses of the motion picture in question.

As noted in *NAACP* v. *Alabama*, 377 U.S. 288, 307 (1964), "This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." See also: *Freedman* v. *Maryland*, 380 U.S. 51 (1965); *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961).

Indeed, ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of . . . arbidgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

We do not mean to suggest here what procedures, short of seizure and detention, states may constitutionally follow in a case such as this to properly prepare and present their contentions. We note, however, that the numerous lower court opinions in this area are not without suggestions for alternatives. See, e.g., *Tyrone, Inc.* v. *Wilkinson*, 410 F.2d 639, 644 (4th Cir. 1969), cert. denied, 396 U.S. 985 (1969); *Metzger* v. *Pearcy*, 393 F.2d 202, 204 (7th Cir. 1968); *United States* v. *Alexander*, 428 F.2d 1169, 1176

[24] Query: is the entire film relevant in a case, for example, in which a single complaint is received from a single individual about his unwilling exposure to a single scene?

(8th Cir. 1970); *Bethview Amusement Corp.* v. *Cahn, supra.* To be sure, some burden on constitutionally protected uses of the motion picture in question will be imposed in any case, but the alternatives suggested in these cases are certainly far less onerous than seizure and detention. The state may, "using some or any of the alternatives suggested . . ., succeed in reconciling the interest in securing evidence . . . with the First Amendment principle of avoiding substantial restraints on speech. . . ." *Astro Cinema Corp. Inc.* v. *Mackell, supra.*

All we argue here, however, is that seizure of a motion picture is constitutionally impermissible in a case where that motion picture is not alleged to be obscene *per se.* In our judgment, seizure in such a case ". . . is to burn the house to roast the pig." *Butler* v. *Michigan, supra.*

CONCLUSION

It is respectfully submitted that the judgment under review in the instant case should be reversed.

Respectfully submitted,

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